NO. 22588

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

JOSE MALAGON-RAMIREZ,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLEE'S BRIEF

APPEAL FROM
THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF CALIFORNIA

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I.

JURISDICTIONAL STATEMENT

This is an appeal from the judgment of the United States District Court for the Southern District of California adjudging appellant to be guilty as charged in all four counts of a four count indictment.

The offenses occurred in the Southern District of California. The District Court had jurisdiction by virtue of Title 18, United State Code, Sections 3231 and 111, and Title 21, United States Code, Sections 176a and 174. Jurisdiction of the Court rests pursuant to Title 28, United States Code, Sections 1291 and 1294.

II.

STATEMENT OF THE CASE

Appellant was tried under an indictment consisting of four counts. Counts One and Two involved approximately one ounce of heroin and Counts Three and Four approximately seventy pounds of marihuana. Counts One and Two were both violations of Title 21, United States Code, Section 174, and Counts Three and Four of Section 176a thereof. Count One charged the appellant with having smuggled the heroin and Count Two with the transportation and concealment thereof. Count Three charged the appellant with having smuggled the marihuana and Count Four with the transportation and concealment thereof. [C.R. 2-5].[1/]

Appellant pleaded not guilty [C.R. 10] and was tried before a jury on June 6, 1967. [C.R. 19-20; R.T. 2].[2/] He was found guilty on all four counts [C.R. 21; R.T. 87-88]. Thereafter, on July 7, 1967, appellant was committed to the custody of the Attorney General for a period of seven (7) years on each count to run concurrently [C.R. 24].

At the close of the government's case in chief, appellant had made a motion for judgment of acquittal as to Count Two only (the transportation and concealment of the heroin) but it was denied [R.T. 35].

1/ "C.R." refers to Clerk's Record on Appeal.

2/ "R.T." refers to Reporter's Transcript of Proceedings.

III.

ERROR SPECIFIED

1. Appellant's motion for judgment of acquittal was erroneously denied. The circumstantial evidence of the possession of the heroin was insufficient. [Appellant's Brief, p. 5 and 7].

2. The trial court's instruction on the subject of reasonable doubt was erroneous and appellant was thereby deprived of the benefit of the presumption of innocence [Appellant's Brief, p. 6, 7-9].

IV.

STATEMENT OF THE FACTS

On February 15, 1967, appellant entered the United States from Mexico at the Port of Entry, San Ysidro, California. He was driving and was the sole occupant of the vehicle [R.T. 4]. He presented a non-resident alien border crossing card and gave a negative customs declaration in regard to merchandise [R.T. 5]. The Customs Inspector, Mr. Trumble, noted the rear arm rests were missing and the rear window would not roll down and so escorted the appellant to the secondary inspection area. There appellant was escorted into the office and seated in the chair beside the desk [R.T. 5]. There were no other people sitting next to the chair; the chair was approximately a foot and a half to two feet from the Customs Inspector in the office; it was the only chair in the vicinity [R.T. 6]. While appellant was seated in the chair, Mr. Trumble went out to the car and found packages containing a green vegetable substance [R.T. 5-6].

Mr. Trumble then returned, took appellant into the search room, searched him and found nothing [R.T. 6]. Mr. Trumble then placed appellant in one of the holding rooms and returned to the office; as he walked by the chair where appellant had been sitting he saw a rubber contraceptive lying on the floor beside the chair. His Marquis Reagent test for heroin was positive with regard to the tan powder taken from the contraceptive [R.T. 6-7].

On cross-examination, Mr. Trumble testified that he noted nothing peculiar about the behavior of appellant who was cooperative [R.T. 8-10]. Mr. Price was the inspector in the office and the only person in the immediate vicinity of the chair when the appellant was brought in and seated. Mr. Trumble did not make a preliminary search of the area surrounding the chair. He further testified it was quite likely that someone had sat on the chair previously [R.T. 10-11]. Appellant became slightly agitated when he and Mr. Trumble got back to the search room, but up to that point he hadn't been unusually nervous [R.T. 12]. The contraceptive was about six to eight inches from the chair and was between the desk and the chair, about a foot to fourteen inches from the desk [R.T. 13].

Appellant stipulated as to the chain of custody of the contraband and that a chemist would testify it was marihuana and heroin [R.T. 14-16].

Customs Agent Maldonado testified that he questioned the appellant on February 15 after advising him of his rights [R.T. 20-21]. At that time appellant denied knowledge of the marihuana and heroin and said his only reason for making the trip was to obtain a stove for his wife [R.T. 23], that

he had met a Mr. Padilla who stated he had some connection in the United States to obtain a stove at a reasonable price, had gone to Los Angeles with Mr. Padilla on February 10, but couldn't find a stove and so met with Padilla again on the 15th for another trip [R.T. 22-23].

On both occasions Mr. Padilla got out and walked across the line to meet with two other riders in the United States side who were to help defray travel expenses [R.T. 22-23].

The agent could not locate Mr. Padilla and appellant could give no instructions or method as to how to locate him. The car was registered to a Mrs. Maria de Los Angeles in Tijuana [R.T. 25]; her address on the registration did not exist and she was unknown by the people who lived in the area of the address [R.T. 27]. Appellant did not know Mr. Padilla's first name.

The appellant attempted to plead guilty to Count Three of the indictment out of the presence of the jury but would not admit knowledge of the marihuana prior to its discovery by the agents [R.T. 36-39].

The defendant testified that he was 29 years old, married and had 3 children; that he came from Michoacan to lower California and resided in the Edif. Fertana Building but moved to 33B Auzuras [R.T. 40-41]; that he worked for a Surety Company as an agent and about 15 days before the arrest he met a Mr. Padilla who had the vehicle involved and appellant was going to sell him insurance because Padilla told him he had several cars [R.T. 42]. He further testified that Padilla had a secondhand store and was

going to assist appellant in obtaining a stove, but he did not know where Padilla's store was [R.T. 43]; that he never used marihuana or heroin; that he had never been arrested and attended school 5 years [R.T. 44]. Appellant also testified he only knew Padilla by his last name, had both Lower California and Michoacan drivers' licenses and did not know a Mrs. Maria de Los Angeles; that Padilla never gave him any money; and that he was going to bring the stove back in the trunk of the car [R.T. 45] and put it in his house at 33B Azuras, Colonial Libertad [R.T. 46]. He further testified Padilla didn't cross the line in the car because he was to meet two passengers on the United States side who didn't have resident cards, just local cards [R.T. 47].

On cross-examination appellant stated he never got Padilla's first name because Padilla wasn't ready to do business yet; that he met Padilla near the RCN radio station [R.T. 48]; that he gave the Azuras address to the Customs officer; that the stove was to be a 4 burner in the $15.00 price range [R.T. 49]; that the first trip they went to within 12 kilometers of Los Angeles and the other 2 passengers never used Padilla's first name [R.T. 50]; that they never went to a store but just stopped and Padilla got out and appellant didn't even look for a stove [R.T. 51]. He further testified he had never gone to Padilla's store and never saw Padilla's other cars [R.T. 52].

On the Court's questioning, appellant stated he had seen Padilla four times and that on the first trip they did not go to stores [R.T. 53-54]; that he got a ticket on that trip and when he was arrested at the border he was

actually coming across to pay the ticket and wasn't interested in the stove any more [R.T. 56]. That on his return appellant was to leave the car with the keys in the ashtray at the Alva Rojo School [R.T. 56].

On rebuttal Agent Maldonado testified appellant did not give him an address on Auzuras [R.T. 57]. Appellant was recalled to testify he never had the heroin [R.T. 61].

The Court's instructions are covered by pages 72 through 84 of the Reporter's Transcript and appellant made no objection to them [R.T. 85].

V.

ARGUMENT

A. THE SUFFICIENCY OF THE EVIDENCE SHOULD NOT BE CONSIDERED BY THIS COURT, BUT EVEN SO THE EVIDENCE OF THE POSSESSION OF THE HEROIN WAS SUFFICIENT AND THE DENIAL OF THE APPELLANT'S MOTION FOR JUDGMENT OF ACQUITTAL WAS PROPER. IN ANY EVENT DENIAL OF THE MOTION WITH REGARD TO THE HEROIN WAS NOT PREJUDICIAL WITH REGARD TO THE MARIHUANA COUNTS.

Actually appellant's motion for judgment of acquittal was only as to Count Two of the indictment [R.T. 35], and it was not renewed at the close of the case after appellant put on his evidence [R.T. 57-62]. As a general rule a motion for judgment of acquittal, made at the close of the evidence for the prosecution, is waived and a review of the evidence

precluded, where the accused introduces evidence on his own behalf and does not renew the motion at the conclusion of all the evidence.

Lucas v. United States, 325 F.2d 867 (9th Cir. 1963)

Foster v. United States, 318 F.2d 684 (9th Cir. 1963)

Drown v. United States, 198 F.2d 299 (9th Cir. 1952), cert. denied, 344 U.S. 920 (1953).

Thus, under the general rules of procedure, this court should not consider the sufficiency of the evidence. Furthermore, since the motion was only made as to Count Two, it would seem anomalous to consider it with reference to the other counts.

Assuming for purposes of argument that a renewal of the motion at the close of the case was not necessary; nevertheless, as pointed out above it was only made with reference to Count Two. Counsel for appellant recognizes this but argues that the failure to grant the motion was prejudicial as to all four counts (Appellant's Brief, p. 13-14). His reasoning, however, is circular, for he states, "If the jury believed that he had dropped some heroin in the Customs Office, it was of course exceedingly unlikely that they would believe that he did not know that the marihuana was in the automobile. Since the jury did erroneously conclude the appellant dropped the heroin . . . . . they must have been prejudiced as to the marihuana counts." (Appellant's Brief, p. 13-14).

The circuity of this argument is demonstrated by reversing the phraseology:

"If the jury believed that appellant smuggled the marihuana, it was of course exceedingly unlikely that they would believe that he did not drop the heroin in the customs office. Since the jury concluded the appellant smuggled the marihuana . . . . they must have been influenced thereby as to the heroin counts."

It is submitted the second "circuit" phrased above, i.e. marihuana to heroin rather than heroin to marihuana, is the more likely route taken by the jury. However, rather than getting into a chicken and egg situation as to the reasoning of the jury, it would seem wiser to analyze the evidence. It is uncontested that the appellant was the driver and sole occupant of an automobile in which the marihuana was smuggled, and it is submitted that even appellant's counsel must concede that appellant's explanation of the circumstances was "fishy" at best. Under such evidence there can be no question of the sufficiency of the evidence as to counts Three and Four [See Aguilar v. United States, 363 F.2d 379 (9th Cir. 1966), a similar border crossing case where the accused was driving another's car, there was no direct evidence or admission of knowledge, and the trier of fact was held to be entitled to believe the accused's story "fishy"].

Be that as it may, assuming for the moment that the motion as to Count Two should and would have geen branted, it is nevertheless submitted that no prejudice to the appellant resulted, for the heroin would still have been admissible as to Count One. And since no motion for judgment of acquittal was made with respect to Count One, it would certainly seem out of order to even consider that matter now. And if the

same so-called prejudicial matter would have been considered anyway, how could appellant have been prejudiced by the denial as to Count Two?

Thus, in order to even consider appellant's first main argument, we must assume (1) that renewal of the motion for judgment of acquittal at the close of the case was not necessary, and (2) that the motion was made with regard to Count One as well as Count Two. Assuming arguendo that such is the case, was the evidence in regard to the heroin sufficient to support conviction as to Counts One and Two?

In arguing that the evidence is insufficient, appellant relies solely on Davis v. United States, 382 F.2d 221 (9th Cir. 1967) and completely ignores such cases as Galvan v. United States, 318 F.2d 711 (9th Cir. 1963) where the heroin was found the next morning about 9 feet from the nearest track of Galvan's car and later pulled out of a garbage truck, and Vaccaro v. United States, 296 F.2d 500 (5th Cir. 1961), cert. denied, 369 U.S. 890 (1962) where the marihuana was found near the side of the road about 24 hours later and no one saw the accused holding or disposing of the suitcase but nevertheless it was admitted into evidence, or Ketchum v. United States, 259 F.2d 434 (5th Cir. 1958) where a sack of marihuana was found alongside the road about a half hour after the defendants were arrested. In that case no witness testified the sack was ever in the defendant's physical possession, nor that it was seen being disposed of, but the conviction was affirmed and withstood repeated attacks to the United States Supreme Court.

Cert. denied, 359 U.S. 917 (1959)

Rehearing denied, 359 U.S. 956 (1959)

Cert. denied, 365 U.S. 861 (1961)

Cert. denied, 369 U.S. 880 (1962).

It is true that in the cases just cited there was evidence of flight which is not the case here, but in the instant case there is evidence of contraband in the car of which appellant was the sole occupant though such was not the case in Galvan and Davis. Furthermore, in Davis during the interval from the time the accused occupied the Sheriff's car to the time the contraband was found, the car had been unattended on several occasions and the officer had made several observations of the automobile without discovery of the heroin, while in the instant case the heroin was found almost immediately after the appellant had occupied the chair in question.

Appellant concedes the time interval difference in Davis from the case at bar but emphasizes the opportunity for someone else to have disposed of the heroin prior to appellant's presence in the chair (Appellant's Brief, p. 12-13). The same, however, could be said with respect to the Galvan, Vaccaro and Ketchum cases cited above and also even with respect to Davis, for in that case the deputy sheriff testified that though he examined the vehicle before Davis entered it, nevertheless he did not look under the "cool cushion" on the driver's seat where the heroin was eventually discovered, Davis v. United States, 382 F.2d 221 (9th Cir. 1967) at page 223.

Even assuming that the Davis case does apply, that the motion need not have been renewed, and that it is held to have impliedly been made with respect to Count One as well as Count Two; nevertheless, appellant

still has the difficult burden of establishing that denial of the motion for judgment of acquittal as to Counts One and Two was so prejudicial as to Counts Three and Four that the judgment must be reversed as to all four counts.

It is interesting to note that appellant cites no cases to support this amazing contention, and it would appear to the government that the only grounds for such a position would be that the trial court committed plain error in not rejecting all evidence as to the heroin or in not instructing the jury to disregard all evidence relating thereto. Many cases can be cited, of which Lucas v. United States, cited above, is only one, to the effect that this court should not exercise its discretion regarding errors not properly raised at the trial unless failure to do so would shock its judicial conscience and operate as a palpable miscarriage of justice. Nowhere did appellant object to the introduction of the evidence regarding heroin or request an instruction for the jury to disregard it, and when all the circumstances of this case are considered, certainly it cannot be claimed there was a palpable miscarriage of justice or that the judicial conscience of this court should be shocked. After all it is uncontroverted that the appellant was driving and was the sole occupant of the vehicle in which marihuana was secreted. Furthermore, the appellant was sitting in the chair and heroin was found nearby almost immediately thereafter. Those facts are inescapable, and with the congressional inferences contained in Title 21, United States Code, Section 176a and 174, and the inherently "fishy" nature of appellant's story clearly set forth in the record, certainly

this court could not believe there was a palpable miscarriage of justice.

B. THIS COURT SHOULD NOT RECONSIDER THE TRIAL COURT'S INSTRUCTIONS TO THE JURY BECAUSE NO OBJECTION TO THEM WAS MADE BY THE APPELLANT. NEVERTHELESS, THEY WERE ADEQUATE, AND IN ANY EVENT DID NOT CONSTITUTE PLAIN ERROR.

Appellant expressly made no objection to the instructions as given or ommitted [R.T. 85]. Consequently, he has no standing here to complain.

Ramirez v. United States, 294 F.2d 277 (9th Cir. 1961)

Appellant concedes that the definition of reasonable doubt given by the trial court [R.T. 75-76] was proper [Appellant's Brief, p. 10], but complains that the court's later instruction concerning the judging of the evidence [R.T. 83, lines 5-14] was easier to understand and prejudicially wrong.

The portion complained of is an exact quote of the first two paragraphs contained in Section 15.06 of Mathes and Devitt's 1965 edition of Federal Jury Practice and Instructions. Appellant cites only one case, Holland v. United States, 348 U.S. 121 (1954), but that case discusses the definition of reasonable doubt and not an instruction concerning how the jury is to consider and analyze evidence. In fact when that point is discussed in Holland (in that paragraph immediately prior to that quoted by appellant), the Supreme Court said, "In both (circumstantial and testimonial evidence), the jury must use its experience with people and events in weighing the

probabilities." Holland cited supra, at page 140 thereof. It is submitted this definitely sounds in consonance with the trial court's charge here considered and, in any event, does not indicate plain error or prejudice. 3/

Appellant also complains about the lack of instruction regarding the so-called Scotch verdict - - "not proven" [Appellant's Brief, p. 17], but cites no case in regard to that requirement, and certainly if failure to give such an instruction is plain error some case requiring it could be cited. Be that as it may, it is submitted that taken as a whole the instructions were adequate and certainly cannot be held to shock the judicial conscience or to operate as a palpable miscarriage of justice.

3/ Incidentally, it is interesting to note that the Supreme Court, at p. 139-140 of Holland, rejected a requested instruction regarding "every reasonable hypothesis other than that of guilt" which is the heart of appellant's Argument I.